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No. 92-44

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV,

Petitioner,

v.

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a LAKES APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, ODC COMMUNICATIONS CORPORATION, and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DEBORAH C. COSTLOW
Counsel of Record
THOMAS C. POWER
WINSTON & STRAWN
1400 L Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-5700

Counsel for Respondents

Dated: August 5, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that § 621(a)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 541(a)(2), does not authorize franchised cable television operators to install cable facilities in nondedicated, wholly private easements without the consent of the property owner or easement holder?

2. Whether, if § 621(a)(2) permits franchised cable operators to install cable facilities in private easements without the consent of the property owner or easement holder, the statute is unconstitutional for failing to provide for payment of just compensation?

LIST OF PARTIES AND RULE 29 CERTIFICATION

All of the parties are listed in the caption, except as noted below.

National Operating Limited Partnership, a privately-held partnership, is the successor-in-interest of Appellants McNeil Real Estate Fund VI, Ltd. and Woodsong Associates, Ltd.

MaxTel Associates Limited Partnership has purchased all of the assets of Appellant ODC Communications Corp. Telemedia Associates Limited Partnership is the general partner of MaxTel Associates Limited Partnership, and Telemedia Associates, Inc. is the general partner of Telemedia Associates Limited Partnership.

Robert A. McNeil Corporation, the original property manager of the subject properties, has been replaced by Heideger Enterprises, which is a subsidiary of National Realty Advisers, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Cable Holdings of Georgia, Inc. d/b/a Smyrna Cable TV ("Cable Holdings"), operates a cable television system in Cobb County, Georgia pursuant to a franchise issued by the County. (R2-40-3)[1] Cable Holdings seeks the right to install and maintain cable facilities within two privately-owned apartment complexes, the Lakes Apartments and the Woodsong Apartments, and to provide cable programming to the residents, against the wishes of the property owners and without payment to them of just compensation for the permanent, physical occupation of their private property.

When suit was filed, the two apartment complexes were owned by Respondents McNeil Real Estate Fund VI, Ltd. and Woodsong Associates, Ltd., respectively, and managed by The Robert A. McNeil Corporation. (R3-44-5) (These entities will be referred to collectively as "McNeil".) ODC Communications Corporation ("ODC"), the remaining respondent, is a private cable operator, *i.e.*, a video services provider with no franchise obligation because its systems are located wholly on private property. (R3-44-5) 47 U.S.C. § 522(6) (1988). ODC, or its successor-in-interest, has been the exclusive provider of cable service to the apartments since 1985, pursuant to two virtually identical contracts with McNeil. (R3-44-10; R3-44-28)[2] ODC succeeded Cable Holdings, which had installed its facilities and operated as the exclusive provider of video program-

[1] Citations in this form are to the corresponding volume, document number, and page from the record before the Eleventh Circuit.

[2] Respondents McNeil and ODC dispute Cable Holdings' assertion, Petition at 4 n. 4, that the exclusivity provision in the contracts does not bar Cable Holdings from providing service.

ming to the properties until the expiration of its own contracts with McNeil.

Cable Holdings claims a statutory right to permanently, physically occupy existing easements which allegedly exist exterior and interior to the apartment complexes pursuant to the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (1988) ("Cable Act"), the statute which permits local governments to franchise cable television operators. 47 U.S.C. § 541(a)(1) (1988). In pertinent part, Section 621(a)(2) of the Cable Act provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses . . . .

47 U.S.C. § 541(a)(2) (1988). ODC and McNeil contend, and the Eleventh Circuit held, that the Cable Act's use of the term "dedicated" limits Cable Holdings' access to easements which McNeil has formally dedicated to the public for compatible uses. As the appeals court explained:

> In general, an easement is legally "dedicated" only when the private property owner relinquishes his rights of exclusion regarding the easement so that the general public may use the property. *See Black's Law Dictionary* 412 (6th ed. 1990). For example, a property owner who develops a subdivision will routinely "dedicate" corridors of land throughout the subdivision for general use by all utilities that service the subdivision.

Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 606 (11th Cir. 1992) ("*Cable Holdings II*"). Since even Cable Holdings concedes the absence of dedicated easements, the appeals court remanded the case with instructions to enter judgment for McNeil and ODC.

Cable Holdings argues that the Cable Act also permits it to force access to non-dedicated easements, *i.e.*, easements created by a private arrangement in which the landowner grants access to one party, such as a specific utility, but retains the right to exclude all others. Although Respondents agree with the Eleventh Circuit that the Cable Act limits Cable Holdings' access to dedicated easements, they nevertheless presented evidence to show that any private easements at the properties are exterior to the buildings and therefore not compatible with the provision of cable service to tenants, since that requires installation of facilities inside the buildings. If no interior easements exist, Cable Holdings has no right to provide cable service even under its own construction of the Cable Act.

Evidence of private easements consists primarily of ODC's two contracts with McNeil. (R-3-44-10) Section 1.2 of the contracts grants to ODC an exterior easement of approximately 750 square feet over each complex. McNeil did not intend to grant easements interior to the buildings (R3-44-52), and ODC claims no interior easements. (R3-44-50) Georgia Power Company has also been granted exterior easements over the properties pursuant to private contracts. (R3-44-62 through 69) However, Georgia Power claims no easements interior to the apartment buildings. (R3-44-64, 70) The local phone company, Southern Bell Telephone and Telegraph Company, claims no easements of record, interior or exterior. (R3-44-146) There is no other evidence of easements, dedicated or private.

The district court agreed with Cable Holdings that the Cable Act grants cable franchisees access to private easements and found that ODC's easements extend into the building interiors. Accordingly, the court ruled that Cable Holdings could "piggyback" its facilities alongside those installed by ODC. (62a)[3] The district court did not enter final judgment, however, pending a determination of the amount of just compensation to be paid for the taking of

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[3] Citations in this form are to the appendix to Cable Holdings' petition.

a private easement. (63a) Subsequently, the district court reversed itself, ruling that just compensation need not be paid for the taking of private easements. (69a) Thus, final judgment was entered in favor of Cable Holdings permitting it to reconstruct its cable system along the existing ODC cable lines without payment of just compensation. (68a)

Respondents appealed, challenging the district court's construction of the Cable Act and its finding of interior ODC easements. Before the Eleventh Circuit, Cable Holdings argued that the lower court also permitted it to install facilities inside the apartments via the Southern Bell and Georgia Power utility lines. Respondents moved to strike that portion of Cable Holdings' brief on the grounds that the trial court had found no interior utility easements and that Cable Holdings had not appealed that ruling.[4]

The court of appeals initially deferred a ruling on the motion to strike, and then rendered the motion moot by ruling on the underlying merits of the case. As noted, the appellate court reversed the decision of the trial court, holding that the Cable Act does not grant franchised cable operators access to private easements. Because there are no dedicated easements at the McNeil properties, the Eleventh Circuit remanded the case with instructions to enter judgment in favor of McNeil and ODC.

Cable Holdings' petition for rehearing and suggestion of rehearing en banc, alleging a conflict with prior Eleventh Circuit cases, were denied. (73a)

SUMMARY OF ARGUMENT

The Eleventh Circuit's ruling that the Cable Act does not grant Cable Holdings the right to provide its service

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[4] Cable Holdings previously had acknowledged that it could not maintain facilities outside of the ODC easements when, in direct response to a question posed by the district court, Cable Holdings stated that it "was prepared to remove its system when ODC no longer enjoys the right to serve tenants over piggyback lines." (R7-108-1)

to the tenants of McNeil's apartment buildings is in harmony with the only other circuit court to have addressed the issue. These circuit court opinions, like those of other courts, are consistent with this Court's precedent holding that a private property owner has the unfettered constitutional right to repel a permanent, physical occupation of its property when, as here, there has been no valid exercise of eminent domain powers.

The language of the statute limits franchised cable operators to "dedicated" easements, *i.e.*, easements created by plat recordation or other formal offer which is accepted by the public. Congress could freely legislate that result since the property owner, by dedicating the easements for public use, waives any right to be compensated for the occupation and use of the easements. Since no dedicated easements exist at the McNeil properties, the Eleventh Circuit properly found that Cable Holdings has no right of access.

Congress considered a separate statutory provision that expressly granted franchised cable operators a right to serve tenants of multi-unit dwellings, even if such service required physical occupation of private property, but then rejected that proposal out of a concern for private property interests. Thus, Cable Holdings is seeking to enforce rights which Congress intentionally chose to withhold from franchised cable operators.

Congress' rejection of the forced right of access claimed by Cable Holdings comports with congressional policy in favor of head-to-head competition "at the property line" in the provision of cable programming, and against regulations designed to prop up one segment of the industry with special rights. In contravention of this policy, Cable Holdings would have this Court find that Congress intended to grant franchised cable operators a right of access to tenants of multi-unit dwellings, but to deny that right to alternative providers of cable programming.

Enforcement of such a right in this case, by granting Cable Holdings access to private easements, would destroy

the property owner's constitutional right to exclude others from its property. The Cable Act's omission of any provision for the payment of just compensation for the resulting taking of private property demonstrates congressional intent to leave intact the right of property owners to control access to their property and to decide for themselves whether and how cable television, like any other amenity, will be provided to their tenants.

For these reasons, this Court should deny the petition.

ARGUMENT

I. THIS COURT NEED NOT GRANT REVIEW BECAUSE THERE IS NO CONFLICT AMONG THE FEDERAL CIRCUITS AND THE DECISION BELOW IS IN COMPLETE ACCORD WITH THIS COURT'S TAKINGS JURISPRUDENCE.

The Eleventh Circuit has never ruled, and Respondents have never claimed, that there is no such thing as a dedicated easement *for* use by utilities. Such dedicated easements typically exist along public streets and highways and abut the private property edge of single family lots. On subdivision properties, such dedicated easements are often statutorily mandated and again usually are located between a street and the edge of the single family lot line. *See, e.g.*, Fla. Stat. ch. 177.081, 177.091 (1987); Cal. Govt. Code § 66410 *et seq* (West 1983). An easement is ordinarily dedicated via a plat recordation which clearly delineates the corridor of land *intended* by the property owner to be reserved for general utility usage on behalf of the public, and which is *accepted* as such by the municipality or county in which the subdivision is located.

Respondents maintain, and the Eleventh Circuit has consistently held, that Congress intended cable franchisees to have access to these types of easements, *i.e.*, "dedicated easements", in § 621(a)(2) of the Cable Act. Given such access, cable franchisees are not hindered in their deployment of "pass-through" trunk line throughout the franchise area. It is up to the single family homeowner,

however, as to whether the cable franchisee is permitted to install its drop or feeder line across the front or back or sideyard of the single family lot and into the single family home itself. This is so despite the existence of utility transmission lines which the single family homeowner has authorized to be installed to service the property. This is so even if the single family homeowner executed a formal easement document with a *particular* utility pursuant to which the utility installed its transmission line. Absent a dedicated easement reserving a strip of land for use by all utilities on behalf of the public, a cable franchisee has no right to force access to any portion of the private property of the single family homeowner, including any private easements negotiated and obtained by a particular utility for its own use.[5]

Section 621(a)(2) does not distinguish between the access rights afforded to cable franchisees on the basis of whether the property is single family or multifamily. With respect to multiunit dwellings such as condominia or rental properties, it is still up to the property owner, be it a landlord or a condominium association, to determine whether the cable franchisee installs its facilities across the front or back or sideyard of the private property and into the multiunit dwelling itself. Again, the existence of utility lines, even if installed pursuant to a contractually-obtained private easement, does not entitle the cable franchisee to force access.

It is true that the consistent construction of § 621(a)(2) by both the Eleventh and Third Circuits defeats access by cable franchisees to the *interior* of single family homes and multiunit dwellings. Yet the statutory language of § 621(a)(2), which specifically uses the term "dedicated",

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[5] For that matter, an electric or gas or telephone company could not force access to such private property without invoking and pursuing a condemnation action which would include due process and just compensation protections for the property owner. Nor could a municipality do so.

as well as the legislative history, prove that Congress never intended for cable franchisees to force their way into private dwellings.

A. *Cable Holdings II* Is In Complete Harmony With The Decisions Of Prior Panels Of The Eleventh Circuit.

The Eleventh Circuit has never authorized a cable franchisee to install cable facilities within a wholly private easement pursuant to § 621(a)(2), much less to force access to the interior of a multiunit dwelling via the use of such easements. The easements at issue in the Eleventh Circuit's decisions in *Centel Cable Television Co. v. Admiral's Cove Associates*, 835 F.2d 1359 (11th Cir. 1988) and *Centel Cable Television Co. v. Thos. J. White Development Corp.*, 902 F.2d 905 (11th Cir. 1990) were subdivision easements dedicated for general utility usage via plat recordation.[6] Cable Holdings admits as much. Petition at 11.

Indeed, the question of what substantive right, if any, was granted to cable franchisees under § 621(a)(2) of the Cable Act was not even at issue in *Admiral's Cove*. Rather, that panel determined only that Congress intended a private right of action for cable franchisees to enforce whatever access rights are actually conferred by the statute. In dicta, the panel stated that the type of easement at issue in the case, *i.e.*, an easement corridor dedicated by plat recordation for use by all utilities in general, was the type of easement intended by Congress to be accessible.[7]

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[6] Given the denial of Cable Holdings' petition for rehearing and suggestion of rehearing en banc (with no Judge requesting that the court be polled)(73a), Respondents are hard pressed to understand how Cable Holdings can claim that the *Cable Holdings II* decision conflicts with the decisions of prior panels of the Eleventh Circuit. The alleged "conflict" formed the very core of Cable Holdings' rehearing petition. The *Cable Holdings II* Court explicitly disagreed with Cable Holdings' overly expansive reading of the *Admiral's Cove* and *White* decisions and found its own decision to be in complete harmony with those rulings. *Cable Holdings*, 953 F.2d at 608-609.

[7] Under Florida law, developers of subdivision properties are required

Clearly, the single footnote takings analysis engaged in by the panel, *Admiral's Cove*, 835 F.2d at 1363 n. 7., did not contemplate forced access by a cable franchisee to the interior of multiunit dwellings via a private easement granted solely to a particular entity, be that entity a utility or, as in the instant case, a competing video services provider. This also explains why the *Admiral's Cove* panel did not find its access construction to implicate the constitutionality of § 621(a)(2), even if deemed to be devoid of any just compensation obligation, because the property owner, in dedicating property, waives any right to be compensated for the use of the dedicated easement corridor.

The *Admiral's Cove* construction of § 621(a)(2), albeit in dicta, was left unaltered by the Eleventh Circuit in *White*. The *White* panel simply held that a cable franchisee's right to install its facilities in an easement dedicated via plat recordation created an implied temporary right of ingress and egress over a separate private easement, *i.e.*, private roads, so as to gain access to the dedicated easement corridors. The cable franchisee merely needed a temporary route over which to transport its crew and vehicles to and from the dedicated easement, for the period of time it would take to install the cable facilities in the dedicated easement. No cable facilities were to be installed in the private roads.

Thus, the *White* case concerned dedicated easements through which the utilities were authorized to install their facilities and private roads over which the utilities were

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by statute to "dedicate" property for general public utility use. Fla. Stat. ch. 177.081, 177.091 (1987). Florida law also provides that all such platted public utility easements, which upon approval of the plat are considered dedicated to the public for the subsurface installation of public utility facilities, will similarly include cable franchisees as users of the dedicated easements. Fla. Stat. ch. 177.081, 177.091(29). Florida law itself recognizes the difference in mandating access, without any concomitant just compensation requirement, to public utility easement corridors conveyed by dedication as opposed to easements conveyed between private parties. The Florida statute *exempts* private utility easements from the access requirement: "[T]his section shall not apply to those private easements granted to or obtained by a particular electric, telephone, gas or other public utility." Fla. Stat. ch. 177.091(29).

granted permission to transport their vehicles and crews. As to the former, the *White* panel held that under the Cable Act, the developer could not "prevent a cable franchise [sic] from using *dedicated* utility easements." *White*, 902 F.2d at 909 (emphasis added). As to the private roads, the panel held that a dedicated easement "carries with it by implication the right . . . of doing what is reasonably necessary for full enjoyment of the easement itself." *Id.* at 907 n. 9. This transitory right of ingress and egress over private property attendant upon the use of a dedicated easement does not constitute a taking, there being no permanent physical occupation apart from the dedicated easement itself. The *White* panel, as in *Admiral's Cove*, did not directly reach the issue of whether § 621(a)(2) would be rendered constitutionally infirm if held to authorize a taking of private property, including a private easement, without the concomitant obligation to pay just compensation. Instead, the *White* panel ruled that § 621(a)(2) does not authorize the installation of facilities outside of a dedicated easement in any event.[8]

It is Cable Holdings, and not the *Cable Holdings II* Court, who has misunderstood what this Court has described as the "constitutional distinction between a permanent occupation and a temporary physical invasion." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.

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[8] Observing that the cable franchisee's failure precisely to track the dedicated easements, by installing "some of its cable one to three feet outside of the easement in a few places", was illegal under Section 621(a)(2), the panel directed the property owner "to prevent any such encroachment through a state court action for trespass." 902 F.2d at 911 n. 13. *See also Centel Cable Television Co. v. Burg & DiVosta Corp.*, 712 F. Supp. 176, 178 (S.D. Fla. 1988) ("This Court also finds that [the franchised cable operator] has not sought nor does it have the right to install its cable system outside of the public rights-of-way and dedicated easements of the [private property]. [The franchised cable operator] has no right to run its cable television system directly to an individual [single family home] residence unless the owner of that [private] residence orders cable television service from [the franchised cable operator]").

419, 421 (1982).[9] *Cable Holdings II* posited a completely different set of facts than those at issue in *Admiral's Cove* and *White*: here the alleged easements are private, not dedicated; here access is sought to the interior of multiunit dwellings, not just to exterior pass-through easements in a single family home subdivision; here neither the property owner nor the easement holder have granted consent to Cable Holdings' occupation. Cable Holdings' reading of such prior panels is the distorted one, *i.e.*, that § 621(a)(2): (1) mandates permanent access to and occupation of private easements over the objection of the private easement holder and the landowner; (2) does not and must not provide for any payment of just compensation; and (3) is nonetheless constitutional. Cable Holdings seeks a construction which eliminates the concept of private easement rights from the fabric of the law.[10] The *Cable Holdings II* Court properly rejected Cable Holdings' construction of § 621(a)(2) and issued a decision in complete harmony with the *Admiral's Cove* and *White* rulings.

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[9] As this Court held:

> Our cases further establish that *when the physical intrusion reaches the extreme form of a permanent physical occupation*, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative.*

458 U.S. at 426 (emphasis added).

[10] Cable Holdings seeks to tear down the legal barrier between "dedicated" and "private" easements only to benefit cable franchisees. All other purveyors of cable programming services using alternative delivery mechanisms, such as private or wireless cable operators, have to obtain their own rights from the landowner by private contractual agreement, as Respondent ODC did here. All utilities must do the same, as Georgia Power did here, or comply with eminent domain procedures in which the owner can contest the validity of the condemnation as well as the amount of compensation to be paid if the taking is permitted. A determination that Congress intended to grant access rights to cable franchisees even greater than those afforded providers of essential utility services defies all logic and established jurisprudence.

B. *Cable Holdings II* Is Consistent With The Only Other Circuit Court Decision And The Majority Of Lower Courts Which Have Addressed Forced Access To Multiunit Dwelling Interiors.

On nearly identical facts to the instant case, the United States Court of Appeals for the Third Circuit ruled that § 621(a)(2) does *not* grant cable franchisees any substantive right of access to private property:

> We find no support in the express language of the statute for [the] position that Congress authorized franchised cable companies to force their way onto private property, over the protests of the property owner, in order to offer cable television service to the tenants of the property owner.

Cable Investments, Inc. v. Woolley, 867 F.2d 151, 155 (3d Cir. 1989). The Third Circuit rejected the cable franchisee's demand for "access over *any easements* which have been set aside for uses compatible with cable television, *including those under private arrangement with the owner*." *Id.* (emphasis added). Like the *Cable Holdings II* Court, the Third Circuit concluded that Congress' refusal to pass § 633, which would have granted cable franchisees eminent domain powers, meant that § 621(a)(2) did not authorize access to multiunit dwelling interiors. *Cable Investments*, 867 F.2d at 156.[11]

The Third Circuit did not find its decision to be at odds with the prior decision of the Eleventh Circuit in *Admiral's Cove*, stressing that the type of access sought by the cable franchisee in the *Admiral's Cove* decision was drastically different. Noting that the cable company in *Admiral's Cove* sought installation "in open trenches through easements listed on recorded plats provided by a residential developer for electric and telephone utilities", the Third Circuit stated that the "substantive right sought to be enforced in [*Admiral's Cove*] is more limited than that

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[11] For a complete discussion of § 633, *see infra* at § I.D.

sought here, where [the cable franchisee] seeks access to tenants inside buildings owned by [the property owner]." *Id.* at 154. The Third Circuit is the only other federal circuit court to construe § 621(a)(2). Not even Cable Holdings alleges a conflict between the *Cable Investments* and *Cable Holdings II* decisions.

Many of the lower court opinions cited by Cable Holdings in support of its construction either involve access to classic dedicated easements such as those found in *Admiral's Cove* and *White*, *see Centel Cable Television Co. v. Burg & DiVosta Corp.*, 712 F. Supp. 176 (S.D. Fla. 1988); or to private easements *exterior* to multiunit dwellings, *see United Cable Television v. Eyde*, No. L89-30103 CA (W.D. Mich. Nov. 20, 1989) (preliminary injunction) (cable franchisee expressly did not seek access to the interior of multiunit dwellings); or to exterior private easements on single family home tracts, *see Booth American Co. v. Total TV*, No.CV-91-2286-RSWL (C.D. Cal. Jan. 31, 1992) (private residential single family home subdivision contained both dedicated and private easements); *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425 (Mich. Ct. App. 1990) (access to private easement traversing backyard of single family home property).[12] The *Mumaugh* Court even stated its complete agreement with the holding in the Third Circuit's *Cable Investments* decision that access could not be compelled to the interior of multiunit dwellings under § 621(a)(2):

> [W]e believe that *Cable Investments*, *supra*, is easily distinguished from the present case. Because the deleted proposed § 633 was directly applicable to the very issue presented in *Cable Investments*, the Court logically and properly concluded that Congress, by deleting this section, did not intend

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[12] The decision in *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422 (D. Md. 1989), granted access to exterior utility easements in a private single family home residential subdivision, but does not disclose whether such easements were dedicated or private.

> to allow cable operators to compel access to multi-unit apartment dwellings.

Mumaugh, 456 N.W.2d at 429.

Similarly, Cable Holdings' reliance on *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F. Supp. 1315 (D. Del. 1986), is misplaced since that court's construction of the Cable Act, issued on a motion for preliminary injunction, was overruled by the Third Circuit in *Cable Investments*.

Of the cases involving a claim of access to the interior of multiunit dwellings, the majority of courts have rejected such access. *See e.g., Media General Cable v. Sequoyah Condominium Council*, 737 F. Supp. 903 (E.D. Va. 1990), *appeal pending* No. 90-2399 (4th Cir. argued May 7, 1991) (district court refused to authorize cable franchisee to install facilities within the exterior or interior private easements of utilities or of the third-party cable operator with whom the property owner had exclusively contracted); *UACC-Midwest, Inc: v. Edward Rose & Sons*, No. 1:90-CV-383 (W.D.Mich. May 22, 1990); *Cable Associates, Inc. v. Town & Country Management Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989); *Cablevision of The Midwest, Inc. v. Gross*, No. 60703, 1992 WL 159769 (Ohio App. July 2, 1992); *Continental Cablevision v. Edward Rose Realty, Inc.*, No. L 87-17-CA5 (W.D. Mich. April 27, 1988).

C. *Cable Holdings II* Is Consistent With The Statutory Language Of § 621(a)(2).

Respondents do not claim, and the Eleventh Circuit has never held, that dedicated easements necessarily entail use by every member of the public. The term "dedicated easement" does not require the insertion of the word "public" in front of the word "easement" or "publicly" in front of the word "dedicated".[13] In fact, the term "dedicated"

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[13] Petition at 16. By contrast, the word "public" *is* necessary to modify "rights-of-way" since Congress did not intend cable franchisees physically to install cable facilities within private streets or roads without the permission of the property owner. Cable Holdings' construction of § 621(a)(2) thus leads to the illogical conclusion that Congress excluded cable franchisees from private streets but not from privately-contracted for easements.

standing alone defines the type of easement meant to be accessible, *i.e.*, a corridor of land relinquished by the property owner *not* to a single entity for a specified purpose, but reserved to the public *for* general utility usage or other usage compatible with cable installation. Even dictionaries of common usage recognize this meaning of "dedicate." *See* Webster's New Universal Unabridged Dictionary 474 (2d ed. 1983) ("in law, to devote (land, etc.) to public use").

Dedications can entail very broad or very narrow public uses. The fact that a dedication specifies a particular public use to be made of the property, or that that public use necessarily requires use by only a particular class of users, *e.g.*, utility companies, does not belie the overall public nature of the dedication. The property owner has essentially agreed, by the dedication, not to select the particular users of the land so dedicated or to retain rights of exclusion.[14] There is nothing in the statutory language nor the legislative history, *see infra* at § I.D., to indicate that Congress did not intend "dedicated" to have the historical meaning long employed in both common and statutory property law. The term "dedicated" was used; it must be treated as having significance. To deny that significance is to erase the term from § 621(a)(2). The *Cable Holdings II* Court properly examined the term "dedicated easement" in the real property context and found such usage consistent with the Cable Act's legislative history.

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[14] *See Media General*, 737 F. Supp. at 911 ("Dedication of a property interest occurs only when the owner unequivocally offers that interest to a public entity for public use and that entity unequivocally accepts it."); *Centel Cable Television Co. v. Cook*, Nos. 14-88-8, 14-88-10, 1989 WL 111980 at *5 (Ohio Ct. App. Sept. 27, 1989) (court refused to grant cable operator access to private easement over private land); *Kohler v. Warner Amex Cable Communications, Inc.*, No. 2-86-18, 1987 WL 18220 at *2 (Ohio Ct. App. Oct. 9, 1987) (since "the easement itself was not dedicated, like a street or alley, and was clearly a restricted right granted to one agency only and limited in its use to that agency," § 621(a)(2) has "no application to a right of way that was neither dedicated nor public").

D. *Cable Holdings II* Is Consistent With The Legislative History Of The Cable Act And Furthers Congressional Intent.

Congress expressly rejected passage of a proposed cable mandatory access provision in the Cable Act, *i.e.*, prior § 633 (79a), which would have specifically authorized cable franchisees to condemn property for the installation and operation of their cable facilities upon the payment of just compensation. Congress deliberately deleted § 633 so that property owners could retain the full right to negotiate for the provision of cable services from the supplier of their choice:

> I am particularly pleased with the version of the legislation before us today which differs slightly from the bill reported from the Commerce Committee in June. The bill before us today does not contain a provision I had particular concern about in committee, the so-called consumer access to cable. . . . Although I concur with the intent of this provision, to make cable service available to the greatest number of individuals, I believe this goal can be achieved in a better, more orderly manner *through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided.* Fortunately, . . . *this objectionable section was deleted from this legislation.* . . .

130 Cong Rec. 27984 (daily ed. Oct. 1, 1984) (Statement of Rep. Fields) (emphasis added).[15]

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[15] By deleting § 633, Congress specifically rejected a mandatory right of access over private property for cable television franchisee's [sic] to provide their services. Owners of private property, *including owners of private easements*, are not compelled by the Act to grant franchisees access to their land or easements. Access pursuant to the Act may be had only through public rights-of-way or easements that have been dedicated to the public use.

Media General, 737 F. Supp. at 911 (emphasis added). *See also UACC-Midwest, Inc. v. Edward Rose & Sons*, No. 1:90-CV-383, slip. op. at 3

Even passage of § 633 would not have stripped property owners of their right to provide cable programming services via a supplier other than the cable franchisee. Congress sought to insure that residents had access to cable service from some provider, not to grant a single cable franchisee an unfair competitive advantage or to prefer it over other purveyors of cable programming services. Thus, § 633 exempted property owners who had already provided cable programming services to residents roughly equivalent to that offered by the cable franchisee claiming guaranteed access. Proposed § 633(h)(1).[16]

In deleting § 633, Congress' ultimate conclusion was that the marketplace would ensure residents had access to cable programming from some source without the need for government intervention. Congress opted for competition "at the property line", wherein the property owner selects from among the various cable suppliers competing for access to the premises. Congress was well aware that the property owner's choice could be an exclusive choice. Con-

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(W.D. Mich. May 22, 1990) ("The legislative history set forth in *Woolley* indicates that the deletion of § 633 was not an oversight but was a carefully considered decision. Congress was clearly divided on whether to grant mandatory access and those opposed to mandatory access prevailed.").

[16] Such an exemption proves Congress was *not* concerned that a multiunit residence would be served by a *single* supplier of cable programming services:

> The Committee believes that if a landlord or property owner provides residents of his premises with the ability to obtain a truly equivalent range of services, then the First Amendment goal of providing consumers access to as wide a diversity of information sources and services is not frustrated to the point that it requires a mandated right of access to cable service. *After all, the Committee's goal is to ensure that the public has access to a wide diversity of information—not to require that the information come from a particular source.*

H.R. Rep. 98-934, 98th Cong., 2d Sess. 81-82 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4718 (emphasis added).

gress simply chose not to remedy the alleged problem which Cable Holdings claims exists.

Given the co-existence of §§ 621(a)(2) and 633 in the Cable Act until Congress' last minute rejection of § 633, the sections could not have been intended to accomplish the same purpose.[17] Since § 633 would have compelled property owners to permit cable installation *anywhere* on the premises, including in private easements, there would have been no need for the simultaneous inclusion of § 621(a)(2) had that section been meant by Congress to grant access to wholly private easements. Moreover, while § 633 contained the exemption for property owners already providing cable programming services, § 621(a)(2), as Cable Holdings construes it, grants forced access to *all* easements, dedicated or not, used by utilities or not, without any such exemption. Quite simply, if Congress had meant for cable franchisees to have access to the interior of multiunit dwellings, Congress would have enacted § 633.[18]

Congress did not intend to eviscerate the right of property owners to convey land to a single entity for a single purpose. Rather, § 621(a)(2) was only intended to grant exterior access to dedicated easements voluntarily granted by the property owner for general utility usage. If access rights are restricted to dedicated easements, then the rights afforded by §§ 633 and 621(a)(2) are very different indeed: § 621(a)(2) representing a voluntary grant of access to exterior pass-through easements and § 633 representing forced access to dwelling interiors. If access rights are *not* so restricted, then the rights afforded by §§ 633 and

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[17] *See, e.g., Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 197-200 (1913) (fact that provision was deleted before enacted conclusively establishes that the provision enacted meant something different); *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Thompson v. Kennickell*, 797 F.2d 1015, 1024 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 905 (1987).

[18] Indeed, under Cable Holdings' analysis of § 621(a)(2), a private homeowner could not lawfully resist a cable franchisee's efforts to install cable within the interior walls of the owner's home if easements existed there.

621(a)(2) are identical: both representing forced access to dwelling interiors.

Unlike § 633, § 621(a)(2) and its one paragraph legislative history do not speak in terms of gaining access to dwelling interiors. Undoubtedly, had Congress intended § 621(a)(2) to authorize such forced access, even under the more limited circumstances claimed by Cable Holdings, Congress would have discussed the interrelationship of the two sections and, upon the deletion of § 633, would have included legislative history language concerning forced access to dwelling units within § 621(a)(2). The fact that a consumer-tenant could trigger access under § 633, but not under § 621(a)(2) does not lead, as Cable Holdings advocates, Petition at 12-13, to the conclusion that private easements, express or "implied", were meant to be accessible.[19] Since § 621(a)(2) contemplates a voluntary dedication by the property owner automatically triggering cable franchisee access, consumer "permission" would be both redundant and irrelevant.[20] Under § 633, intended to cover circumstances in which the property owner refused access to dwelling units, consumers could override the property owner and trigger access, albeit with the full

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[19] Cable Holdings argued below that there is no distinction between utility lines and utility easements, or between the cable lines of a competitor and an easement. *See* Brief of Appellee at 26-27 n. 14. Yet if the installation of cable or utility lines always implies an easement, § 621(a)(2) would not have created a "more limited right of access" than that created in § 633 since there is not a single property, be it single-family, rental apartment, condominium, cooperative, or mobile home, that does not have at least an electric or telephone company *line* existing on the premises. Franchised cable operators would have had the same rights of access under § 621(a)(2) that Congress chose to withhold by deleting § 633.

[20] Cable Holdings errs in claiming that it is the cable franchisee that triggers access under Section 621(a)(2). Petition at 13. It is the property owner that triggers access by dedicating easements on the premises. The *Admiral's Cove* decision simply noted, in *discussing what party would have a private right of action* to enforce whatever rights were actually granted by the respective sections, that tenants might also have an enforcement right under Section 633. *Admiral's Cove*, 835 F.2d at 1362 n. 6.

payment of just compensation for the taking which such forced access would involve.

Cable Holdings' arguments render meaningless the exemption in § 633 for landlords who were already providing cable services roughly equivalent to those offered by the cable franchisee claiming a right of access. Proposed § 633(h)(1). If the installation of cable facilities by a non-franchised cable operator *implies* an easement, or if the property owner actually conveys an easement by private agreement, Cable Holdings asserts it can force access regardless of the existence of an alternative cable service provider. Yet § 633 and its legislative history make clear that Congress intended to permit exclusion of the franchised operator in that very situation. Accordingly, it is Cable Holdings who is subverting the Cable Act by claiming rights of access specifically rejected by Congress and greater than any rights possessed by utilities or even governmental bodies. All Congress meant to do by passing § 621(a)(2) was to ensure that cable franchisees, like utilities, could construct their main trunk line system throughout the franchise area by use of dedicated easements and public rights-of-way. Whether a single family homeowner or a landlord wants to invite the cable franchisee actually to install lines within a private dwelling in order to receive cable services is up to the individual private property owner.

In support of its radical excision of constitutionally protected private property rights, Cable Holdings relies on a single paragraph of legislative history which neither defines "dedicated" nor addresses the scope of the rights actually conferred. Petition at 17. Cable Holdings' discussion tellingly disregards as irrelevant Congress' repeated use therein of the qualifying term "dedicated" each time the word "easement" is referenced. In emphasizing a single sentence, *i.e.*, "[a]ny *private arrangements* which seek to restrict a cable system's use of *such* easements or rights of way which have been granted to other utilities are in violation of this section", to assert that it cannot be excluded from the apartment complexes at issue here, Cable

Holdings essentially equates "private *arrangements*" with "private *easements*". *Id.* (emphasis added). If Congress had meant private easements were forever gone from legal jurisprudence, Congress would have said so. Instead, Congress stated that private parties could not agree to restrict a cable franchisee's use of "*such* easements or rights-of-way", clearly referring back to the "public rights-of-way" and "easements dedicated for compatible uses" contained in the statute and the directly prior sentences in the same legislative history paragraph. Accordingly, a property owner who has already granted a dedicated easement for general utility usage cannot validly contract with a third party to exclude a cable franchisee *from the dedicated easement*. That was the crux of the Eleventh Circuit's rulings in the *Admiral's Cove* and *White* decisions, as confirmed by the *Cable Holdings II* Court. *Cable Holdings II*, 953 F.2d at 608-609.

E. *Cable Holdings II* Is Consistent With The Public Policy Underlying The Cable Act.

Property owners are entitled, short of blocking access to dedicated easements, to contract on an exclusive basis for the provision of cable programming services from the supplier of their choice. Had Congress wanted to mandate head-to-head competition between cable providers on private property, Congress would not have exempted property owners who had already provided cable services to residents from the reach of § 633. In essence, Cable Holdings is claiming Section 621(a)(2) made illegal what Section 633 made legal despite the co-existence of the two sections in the Cable Act.

Consistent with the Eleventh Circuit, the Third Circuit does not consider the property owner's exclusion of the franchised operator in favor of an alternative cable services provider to be contrary to federal law or policy:

> We note in passing that even those members of Congress who supported the draft of § 633 which would have provided mandatory access were *motivated by a concern that tenants of multi-unit*

> *dwellings might not have access to cable in the absence of such a provision.* In this case, however, there is *no* basis for any such concern because [the property owner's] tenants *do* have access to cable television, *albeit service provided by a different system.*

Cable Investments, 867 F.2d at 156 n. 3 (emphasis added).

Cable Holdings' construction of § 621(a)(2) is hardly mandated by the stated purposes of the Cable Act to promote competition, establish uniform standards, encourage the growth and development of cable systems and assure the widest diversity of information to the public.[21] In fact, Cable Holdings' construction completely nullifies these objectives. Under a pro-competitive scheme, why would only cable franchisees be entitled to force access to every multi-unit dwelling and single family home in the nation, while competing alternative video services providers would have to negotiate and pay for such rights of access?

According to Cable Holdings, since the Cable Act grants such forced access rights solely to cable franchisees, only they can challenge an exclusive cable agreement. If a franchised operator negotiates an exclusive contract with a landlord, competing alternative video services providers have no remedy; the Cable Act *protects* exclusive cable contracts negotiated by cable franchisees, but *outlaws* the identical contracts if negotiated by competitors.[22] Cable

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[21] Cable Holdings posits that Congress did not intend that the "bizarre array of arcane" state law governing dedication would govern the cable franchisee's right of access. Petition at 19-20. Yet a review of any digest or hornbook reveals the virtual uniformity with which the states have defined "dedicated" as an unequivocal offer by the owner to devote his property to a public use, and acceptance of that offer by the public. *See, e.g.*, 23 Am. Jur. 2d *Dedication* § 1 (1983); 26 C.J.S. *Dedication* § 1 (1956); Tiffany, *The Law of Real Property* § 1098 (3d ed.).

[22] In fact, Cable Holdings' own contracts to serve the apartment complexes at issue here granted *exclusivity*. Cable Holdings maintains its agreements were perfectly lawful under the Cable Act when it had the advantage of exclusivity, but suddenly that same exclusivity became unlawful when obtained by its competitor.

Holdings fails to explain how Congress' intent to promote competition is furthered by tilting the playing field in favor of cable franchisees to the detriment of their competitors. Cable Holdings' goal is obvious: to thwart competition in defiance of the language and the spirit of the Cable Act.

F. *Cable Holdings II* Is Consistent With The Federal Communications Commission Construction Of § 621(a)(2).

The FCC has determined that the statutory scheme of § 621(a)(2) looks to state property law to interpret and enforce the nature and extent of cable franchisees' access rights to "easements dedicated for compatible uses." *See Amendment to Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18647 n. 51 (1985). In fact, the FCC recognized that the term "dedicated" had a special meaning and underscored Congress' intentional use of the term.[23] Rather than explicate the meaning of the term "dedicated," the FCC simply stated that the language is self-explanatory. *Id.* Thus, the FCC, in merely reiterating the precise language of the Act, gave no real guidance at that time as to congressional intent. *See Cable Investments*, 867 F.2d at 155 n. 2.

More recently, the FCC, in describing local jurisdictional impediments to the growth of competitors to monopoly cable franchisees, expressed its opposition to state cable mandatory access laws and apparently to the expansive construction of § 621(a)(2) urged by Cable Holdings:

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[23] As Cable Holdings concedes, Petition at 21 and n. 18, the FCC, upon final adoption of its implementing rules, corrected an earlier misquotation of the language of Section 621(a)(2) and agreed "with the commenters on the use of the term 'dedicated' " and stated that its use "of the phrase 'designated for compatible uses' . . . was not intended to be any more or less encompassing than the phrase 'dedicated for compatible uses' used in the Cable Act." *Amendment to Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18647 n. 51 (1985).

> '[M]andatory access' laws exist in thirteen states and the District of Columbia. These laws provide franchised cable operators, but generally not other multichannel video providers, with mandatory access to buildings. Even in some jurisdictions without mandatory access laws, local authorities achieve the same result by interpreting § 621 of the 1984 Cable Act (47 U.S.C. § 541), which provides franchised cable operators with access to '*dedicated easements*', to apply to *private easements*. In this way, franchised cable operators are granted access to all buildings in which an internal cable system has been provided to tenants or cooperative owners.
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> * * *
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> After reviewing the record, we believe that discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services. Legislative action is needed to cure this problem.

In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, FCC MM Docket No. 89-600, ¶¶102 and 140 (released July 31, 1990). *See also id.*, ¶ 137.

On the basis of the few signals afforded by the FCC on the precise issues raised by the Petition, *Cable Holdings II* cannot be read as conflicting with any FCC construction of the statute.

II. THE FORCED INSTALLATION OF CABLE FACILITIES WITHIN A PRIVATE EASEMENT IS A *PER SE* TAKING OF PRIVATE PROPERTY NECESSITATING THE PAYMENT OF JUST COMPENSATION.

Section 621(a)(2) would be rendered unconstitutional if construed to create a mandatory right of access to private easements against the will of the easement holder and/or the landowner, unless the section also requires just compensation for the taking. Private easements clearly con-

stitute private property. The forced installation of cable facilities within a private easement is a taking of private property requiring the payment of just compensation under the Fifth Amendment to the United States Constitution. *See Loretto*, 458 U.S. at 421. Except for the federal district court below, every court which has found a right of access to private easements has recognized the taking which such forced access permits, and has implied a just compensation provision into § 621(a)(2) in order to preserve its constitutionality. *See Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F. Supp. 1244 (D. Mass. 1985); *United Cable*, No. L89-30103 CA, slip op. at 7; *Mumaugh*, 456 N.W.2d at 430. Cable Holdings stands alone in claiming that forced access to a private easement does not constitute a taking of private property.

The apportionment or "co-use" cases cited by Cable Holdings, Petition at 25, did *not* involve *forced* access by a cable franchisee to a private easement over the objection of the private easement holder. Rather, such cases involved the *voluntary* apportionment of a private easement by a utility whose own easement contract with the landowner granted the utility the right to so apportion; the landowner, having granted the utility the right to apportion, could not raise objection. None of these cases held that the utility could be *forced* to apportion its easement for the benefit of the cable franchisee.

Cable Holdings confuses the issue of taking a private easement *by force* with the issue of a consensual use of a private easement via a *voluntary* apportionment by a utility empowered by contract to apportion.[24] Cable Holdings' actual claim is that § 621(a)(2) *automatically* grants

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[24] If Section 621(a)(2) merely permits the "co-use" of existing easements consistent with already existing common law rights, *i.e.*, use through an apportionment of an easement, Cable Holdings still possesses no access right here. Cable Holdings submitted no evidence that any easement holder (1) has an apportionable easement and (2) has voluntarily agreed that Cable Holdings may access and "co-use" a portion of that easement.

broader, *forced* access to *all* private utility easements, whether or not apportionable, whether or not consent is granted. Yet, if not apportionable, the forced installation of facilities within the private easement violates the landowner's constitutional right to repel a permanent physical occupation; a property interest has been taken without consent and without just compensation.[25] If the private easement is apportionable, § 621(a)(2) is unconstitutional if it forces the easement holder, be it a utility or as alleged here, the competing private cable operator, to apportion its valuable property interest without just compensation. *See FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). Section 621(a)(2) simply did not grant cable franchisees such eminent domain powers.

In *Florida Power*, this Court upheld the constitutionality of the Pole Attachments Act precisely because utilities have the right to refuse access to cable franchisees: "[N]othing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators." *Florida Power*, 480 U.S. at 251. Since the statute did not authorize a taking, the absence of a just compensation provision was not fatal. Equally important, the utility therein had voluntarily entered into a contractual relationship with the cable franchisee, not with a third party on whose private rights the cable franchisee sought to piggyback by force. By contrast, Cable Holdings argues that the Cable Act prohibits both the property owner and the easement holder from repelling its permanent physical invasion.

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[25] *See Media General*, 737 F. Supp. at 909 (emphasis added):

> Distilled to its essence, [the franchised operator's] position is that if a landowner encumbers his property by permitting any other party, not just a utility, to use it in a manner compatible with construction of a cable franchisee's system, the Act authorizes access by cable franchisees. After *Loretto, such degradation of private property rights, including private* easements, is impermissible.

What is clear is that someone holds the interest in the property, both exterior and interior, on which Cable Holdings intends to affix its cable facilities by force. Whether that someone holding the right to exclude is the landowner, the competing private cable operator, or a utility, it is certain that Cable Holdings' permanent physical occupation of that property is a *per se* taking under this Court's *Loretto* decision.[26]

Cable Holdings attempts to avoid the constitutional implications of its intended physical invasion of the apartment complexes at issue here by incorrectly characterizing § 621(a)(2) as "a land use regulation which also does not constitute a taking because it does not deprive the property owner of all economically beneficial uses of the property." Petition at 24. It is wholly clear, and all courts, save the district court below, have consistently ruled that the forced installation of cable facilities within a private easement constitutes a permanent, physical invasion.[27] The nature of the access right sought by Cable Holdings here entails a permanent, physical occupation of property by a "third-party interloper", rather than a governmental restriction on permissible uses of the property. Accordingly, all of the regulatory takings cases analyzed by Cable Holdings, Petition at 23-26, are irrelevant.

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[26] In granting an easement, whether to a utility or not, the grantor gives the grantee, and no others, specific rights to use the underlying property. The Act, if it authorizes access via utility easements, essentially condemns space within these easements for use by the franchisee. This is an additional use of the easement not contemplated by the grantor or the grantee. *Loretto* teaches that such compelled access, if for a permanent physical occupation, is a taking *per se*.

Media General, 737 F. Supp. at 908.

[27] The *Admiral's Cove* and *White* decisions are not contrary to this conclusion. As discussed *supra* at § I.A., those panels found that the physical invasion of a dedicated easement does not constitute a taking because the property owner has granted permission for the invasion. This is not the same as a physical invasion of a private easement where neither the property owner nor the easement holder has granted permission for the invasion.

The *Cable Holdings II* Court properly examined Cable Holdings' access claims under a *per se* takings analysis. Far from "hiding from the takings question", Petition at 22, the Eleventh Circuit has confronted it head-on, and has determined that Congress definitively refused to authorize such forced access.

III. SECTION 621(a)(2) DOES NOT PROVIDE FOR JUST COMPENSATION BECAUSE NO TAKING IS AUTHORIZED

A careful comparison of the statutory language of prior § 633 and § 621(a)(2), as well as the differences in the attendant legislative history, defeat Cable Holdings' attempt to graft a just compensation provision onto § 621(a)(2). During the co-existence of the two sections, § 621(a)(2) already contained, by cross-reference to § 633, subsections (A), (B), and (C) as those subsections currently read. Section 633 contained not only those subsections, but also subsections (b)(1)(D), (c), and (d). Each of these latter subsections set forth the just compensation mechanism and limited landowner payments to whatever just compensation amount was ultimately determined.[28] Thus, while cable franchisees had to protect the safety of property and persons ((A)), bear the cost of such installation ((B)) and compensate owners for any *damages* caused ((C)), § 621(a)(2) did *not* require compensation for the *value* of

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[28] That mechanism would have required scrutiny of the "extent to which the cable system facilities physically occupy the premises; the actual long-term damage which the cable system facilities may cause to the premises; the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and the enhancement in value of the premises resulting from the availability of cable service." H.R. Rep. 98-934, 98th Cong. 2d Sess. 81, 115 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4718. "As initially drafted, therefore, the Act not only unambiguously required that a franchisee be given access, but also explicitly provided just compensation for the concomitant taking." *Media General*, 737 F. Supp. at 910.

any property taken, *i.e.*, subsection (D) of § 633(b)(1).[29] Had Congress intended § 621(a)(2) to involve a taking, as did § 633, Congress would have cross-referenced subsections (b)(1)(D), (c) and (d) as well as (B)(1)(A)(B) and (C) at the time of co-existence. No rational basis exists for Congress to distinguish between how just compensation was guaranteed in one section as opposed to the other if both were deemed to trigger a taking. When § 633 was finally deleted, none of the three subsections governing the payment of just compensation was kept for inclusion in § 621(a)(2).[30] Section 621(a)(2) remained just as it was when it co-existed with § 633.[31]

The legislative history explaining § 633 proves that Congress did not intend that § 621(a)(2) would trigger a taking necessitating just compensation. Therein, the *Loretto* decision was discussed, and Congress expressly referenced (b)(1)(D) and (d) as the provisions designed "to comply with the constitutional requirements set forth by the [*Loretto*]

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[29] *See Cable Investments*, 867 F.2d at 158 ("Congress recognized the distinction between damages for which the cable company must compensate under subsection 621(a)(2)(C) and long-term damages which are to be considered in determining just compensation for a taking, which were the subject of the deleted subsection 633(d)(2)").

[30] Congress' failure to transfer to section 621 the subsections requiring regulations that guaranteed just compensation for takings and enumerating the factors to consider in calculating just compensation suggests that Congress recognized that once it deleted the provision for mandatory access to multiple unit dwellings, it need no longer be concerned with the "taking" issue.

Cable Investments, 867 F.2d at 158.

[31] While Cable Holdings surmises that the absence of these just compensation provisions in Section 621(a)(2) is due to Congress' alleged realization that "just compensation methods" could not be "legislated," Petition at 27-28, there is no legislative history support for such speculation nor is there any indication that had Congress *kept* Section 633 in the Cable Act, that Congress would have deleted these "just compensation methods" from Section 633 itself. Cable Holdings' reliance on *Florida Power* is misplaced since that ruling was *post-passage* of the Cable Act and Congress cannot be charged with any knowledge of its teachings.

court." H.R. Rep. 98-934, 98th Cong., 2d Sess. 115 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4718. By contrast, the one paragraph legislative history of § 621(a)(2) *never* contained any discussion of the *Loretto* decision and its just compensation dictate. Surely, upon the deletion of § 633, Congress would have included the "*Loretto* legislative history" in the § 621(a)(2) legislative history had Congress contemplated that § 621(a)(2) would work a taking.

The *Cable Holdings II* Court properly determined that the lack of just compensation in § 621(a)(2) was not a congressional oversight dooming the section's validity, but rather was a critical indication that no taking was contemplated in the first instance. It is Cable Holdings' construction which would prove fatal to § 621(a)(2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. The decision below comports with the statutory language of § 621(a)(2) and its legislative history, is consistent with all other federal circuit constructions of the statutory provision, and is in complete accord with this Court's *Loretto* and *Florida Power* decisions.

Respectfully submitted,

DEBORAH C. COSTLOW
Counsel of Record
THOMAS C. POWER
WINSTON & STRAWN
1400 L Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-5700

Counsel for Respondents

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